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No. 00-839

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.;

Petitioners,

vs.

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FSA, L.L.C.;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully submit this Reply Brief pursuant to Supreme Court Rule 15.6.

ARGUMENT AND CITATION OF AUTHORITIES

I. Respondents do not meaningfully defend the creation of a unique self-executing judgment by the opinion below.

There can be no doubt that the opinion below holds that the bankruptcy court's order and judgment was "self-executing", as Respondents acknowledge. *Brief at 7.* Rather than defend the opinion as written, though, Respondents advance alternative arguments as to why they believe a proper result was reached and erect some straw men never advanced by Petitioners. Even if the alternative arguments advanced could be said to be correct, however, this would not change the fact that the appellate court did create a unique species of self-executing judgment, which, if the decision is allowed to stand, will enshrine forever this odd species of judicial writ, and thus endow bankruptcy courts with unwarranted power.

Respondents' core argument in favor of the "self-executing judgment" is as follows:

> Any requirement that a Section 363(f) sale order be "domesticated" through enforcement pursuant to state law procedures in order to have effect would severely undermine the federal courts' exclusive jurisdiction over bankruptcy cases and property of bankrupt estates. It would

> also seriously diminish the ability of a debtor-in-possession or trustee to sell property of the estate on favorable terms.

Brief at 8.

This argument is easily seen to be a straw man, and it makes no contribution to the debate on federalism which these facts present. Petitioners do not maintain that the *sale order* had to be domesticated in order to have effect. Petitioners do maintain that *the judgment extinguishing their mortgage* had to be domesticated and enforced, and the State of Louisiana agrees. *Amicus Brief at 6-15.* The difference is significant: Respondents suggest that Petitioners would require a bankruptcy judge to go to state court in order to give effect to his sale orders; but this is not Petitioners' argument. Instead, Petitioners maintain that the *beneficiary of the judgment* was obliged, by virtue of, *inter alia,* La. R.S. 9:5251, to effectuate his rights through the state procedure, in order to "affect" and extinguish the mortgage. By merely participating in the sale and failing to follow through in accordance with state procedure, Respondents' lawyers did only half their job; by ordering the sale the bankruptcy judge did all of his job.

As for Respondents' argument that Petitioners' position would "seriously diminish the ability of a debtor-in-possession or trustee to sell property of the estate on favorable terms", Petitioners reply: Not if the debtor-in-possession or trustee followed appropriate state procedure for the sale of real property interests. Indeed, such sales should be enhanced by prospective purchasers

gaining assurance that all federal and state procedures have been meticulously followed.[1]

II. Respondents misperceive the extent of the violence done to Louisiana public records by the opinion below.

Of the several alternative arguments put forth by Respondents, the final one is the most far-reaching of all and advances an erroneous view of the role of the Louisiana public records.[2]

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[1] It may also be noted, in passing, that the "Questions Presented", as framed by Respondents, beg the central question of the Petition. By asking whether the courts below had power to enjoin "*former* mortgage holders" from pursuing their action, Respondents would avoid the premise that, if Petitioners and the State of Louisiana are correct, Petitioners are not "former" mortgage holders – since the unexecuted bankruptcy order could not have extinguished or "in any manner affected" their mortgage rights until such procedures had been followed. La. R.S. 9:5251.

[2] As part of this argument, Respondents characterize Petitioners' position as asserting that "public record inscription creates substantive rights" *Brief at 11.* They provide no citation to the opinion below, however, because this assertion is not found in the opinion. Moreover, this assertion forms no part of Petitioners' argument, and never has done. It has never been contended by anyone, in any of the courts that have addressed this situation over some seventeen (17) years, that the Mortgage was not validly created in 1984, and validly recorded in the public records. Thus, the central, if not the sole, question now before the Louisiana courts is whether the prescriptive period, within which the still un-enforced bankruptcy order could have been enforced, has expired. If this period has expired, as Petitioners maintain, then, because of the failure to secure through enforcement the rights granted under the order, that order cannot now "in any manner" affect the otherwise valid Mortgage, pursuant to La. R.S. 9:5251. Thus, Respondents'

Respondents argue, in essence, that the record notice aspect of Louisiana's public records doctrine is not unduly infringed upon by the opinion below because there are other recorded instruments whereby a diligent prospective purchaser could inform himself of the complete facts and circumstances surrounding the continued recordation of the Mortgage. *Brief at 13-14.* Even if this argument could be said to be correct, as far as it goes,[3] it wholly misperceives the full significance of mortgage recordation under Louisiana's Civil Code and Code of Civil Procedure.

For example, an entire chapter of the Code of Civil Procedure is devoted to the distribution of proceeds resulting from judicial sales according to the rank of encumbrances, and encumbrances take their order of rank *solely* from the order of recordation. La. C.C.P. arts. 2371 through 2381. These codal provisions recognize and require – without exception for unenforced bankruptcy orders such as the one at issue herein – that such encumbrances obtain their priority of payment from the proceeds of any judicial sale *solely* from their chronological order of recordation. If the decision below is allowed to stand, not only would it render nugatory La. R.S.

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repeated argument that an invalid recordation does not *create* substantive rights (*Brief at 11-12*), while strictly true, continues to be, under the facts at bar, a *non sequitur*. Moreover, even if Petitioners were to advance such an argument, the prosecution thereof could not be enjoined under the Anti-Injunction Act because the validity, *vel non*, thereof could not have been actually litigated in the prior federal action.

[3] The State of Louisiana, through its Attorney General, as *Amicus Curiae*, has effectively put to rest any surface validity that this argument may appear to have. *Amicus Brief at 15-20.* A complete treatment of the many aspects of that doctrine is beyond the scope of this Reply Brief.

9:5251 and 9:5031, but it would also serve to make irrational the interaction of 9:5251 and 9:5031 with La. C.C.P. arts. 2371 through 2381. This Court should then anticipate, at some future time, yet another writ application because another federal court will have done violence to more state real property laws by rearranging, to suit the convenience of a bankrupt estate, the priority of payment rules contained in La. C.C.P. arts 2371 through 2381.[4]

Until such time, however, the decision below, under Respondents' restricted view of the public records doctrine, will almost inevitably lead to yet an even more absurd clash between bankruptcy court orders and Louisiana law. Under the instant injunction, Petitioners may not prosecute their mortgage foreclosure action. Yet, the Anti-Injunction Act provides no basis for any order which would actually cancel the mortgage and erase its inscription pursuant to state law. If Respondents attempt to achieve such a result under state law, Petitioners will resist, and, pursuant to La. R.S. 9:5251, respectfully submit that they will prevail. La. C.C.P. arts. 2371 through 2381 direct the sheriff to pay proceeds of any judicial sale *strictly* in order of the rank of the various encumbrances, *without exception*.

As long as Petitioners continue to re-inscribe their mortgage every ten years, there is no way for any subsequent mortgage to become senior thereto. Thus, at some future date, when the underlying property is either sold

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[4] Article 2378 grants mortgage holders the substantive right to enforce their mortgages pursuant to La. C.C.P. arts. 3271 through 3743. In fact it was pursuant to these articles that the mortgage enforcement action under injunction herein was commenced, because the Mortgage was (1) of record (*i.e.*, not cancelled), (2) superior in rank as recorded, and (3) not paid when the 1993 sale was consummated.

or foreclosed upon by a junior lien holder, Petitioners should be able to insist under state law on the payment of their mortgage first. Thus, Respondents' superficial and constricted view of the public records doctrine in fact does nothing to ameliorate the deleterious effects of the decision below on Louisiana property law, including the public records doctrine. Petitioners submit that the Attorney General of Louisiana is quite correct when he suggests that there is nothing actually in the Bankruptcy Code, and no interest advanced by Congress in enacting the Bankruptcy Code, which either does or should supercede the interest "of the State of Louisiana in the integrity of her public records." *Amicus Brief at 20.*

III. Respondents misapprehend the effect of an expired judgment.

As part of their attempt to obfuscate the central issue of the creation of a "self-executing" judgment, Respondents argue that the opinion below "does not enforce the bankruptcy court orders, but merely recognizes their preclusive effect". *Brief at 5-6.* As part of this argument they state that, if a "money judgment is never enforced through execution, it will still have preclusive effect between the litigants as to all issues and claims that were litigated". *Id. at 5 (footnote omitted).* This evidences a clear misunderstanding of the law of judgments.

A judgment declares the rights of the parties and gives rise to the concomitant right to secure the fruits of that judgment through the remedy of enforcement in accordance with the law of the jurisdiction in which enforcement is sought. *See, e.g.*, Henry Campbell Black, *A Treatise on the Law of Judgments, including the Doctrine of Res Judicata*, Chap. 1, § 5 at 8-9 (West 1891) ("Enforcement

is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it"); I Edward W. Tuttle, *A Treatise on the Law of Judgments*, § 4 at 6-7 (Bancroft-Whitney 5th ed. 1925) ("The law provides the means of enforcing judgments. No court has authority to assume legislative powers by providing other means").

It is well-settled in all American jurisdictions, however, that, once a judgment has expired, it can no longer be enforced. *See, e.g.*, Note, *Judgments-Executions-Statutes of Limitations*, 22 No.Caro.L.Rev. 146 (1944). Thus, in any post-expiration execution or suit to enforce a judgment, and secure the rights granted thereby, the expired judgment can provide no basis for securing the rights granted thereunder. Neither *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 148, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) nor *Baker by Thomas v. General Motors*, ___ U.S. ___, 118 S.Ct. 657 (1998), dealt with expired judgments, thus Respondents' reliance on these cases for this aspect of their argument is misplaced. The more appropriate case to look to here is *United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989), holding that a federal judgment may not be enforced, and thus not revived, beyond that period of time provided by the law of the state in which enforcement is sought.

Petitioners submit that the expiration, *vel non*, of the bankruptcy order in question may not properly be the subject of an Anti-Injunction Act injunction because the fact of non-enforcement, the state-law expiration period, and the effects of non-enforcement, could not have been actually litigated in the prior federal proceeding that forms the only basis of federal jurisdiction under the Act. Louisiana law mandates that Petitioners' Mortgage can

not be "in any manner affected" by the bankruptcy court's order until that order has been domesticated and enforced in Louisiana. La. R.S. 9:5251; *Amicus Brief at 6*. Respondents have not enforced their judgment in some fifteen (15) years. If Louisiana courts now decide that the period within which to enforce that judgment has expired under Louisiana law, then the judgment cannot be enforced, and, by logical extension can no longer provide any basis for extinguishing Petitioners' Mortgage.

IV. Respondents misstate the analytical basis of the opinion below.

Respondents argue that the opinion below avoids a "constitutional preemption issue through its reasoned conclusion that the state statutes at issue do not apply to the bankruptcy court orders." *Brief at 9*. Respondents go on to argue that this is so because it was the bankruptcy court order which extinguished the lien, while the state statutes apply only to bankruptcy sales. *Brief at 9-11*. This supposed "reasoned conclusion" by the Fifth Circuit panel does not exist; rather Respondents are here supplying legal analysis the circuit court did not itself choose to utilize. Moreover, the distinction suggested by Respondents would be frivolous, in light of the law applicable to sale orders pursuant to 11 U.S.C. § 363(f).[5]

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[5] Respondents are simply wrong in asserting that the plain language of La. R.S. 9:5251 and 9:5031 does not require that a bankruptcy judgment be domesticated in order to affect mortgage rights in Louisiana. This point is addressed in the Petition at 19-26, and in the Attorney General's *Amicus* Brief at 6-15. Moreover, the fact that La. R.S. 13:4204 permits the recordation of a federal judgment to create a judicial mortgage is irrelevant to the specific provisions of 9:5251 and 9:5031, which deal only with the effects of bankruptcy sale orders on

It is well-settled that any sale of property of the bankrupt estate must be done strictly pursuant to § 363(f), or the sale will be subject to all liens and encumbrances. In *In re Cutaia*, 206 B.R. 250 (Bkrtcy. S.D. Fla. 1997), for example, a sale of property was held to be subject to liens and encumbrances because the trustee had not procured an order authorizing the sale. 206 B.R. at 252. *See also In re Parish*, 171 B.R. 138, 140 (Bkrtcy. M.D. Fla. 1994). In this light it is frivolous for Respondents to posit that La. R.S. 9:5251 and 9:5031 were intended by the legislature to apply only to bankruptcy sales and not bankruptcy sales pursuant to bankruptcy orders. It is particularly frivolous to posit that the opinion below should be affirmed on the basis of this distinction when the opinion itself does not make the distinction.[6] What

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existing mortgages created under state law. *Brief at 10.* Finally, La. Civ. Code Art. 3337 does not "mention . . . a requirement for state court 'domestication' of a foreign judgment" (*Id.*), because, as ¶ (b) of the 1992 Revision Comments makes implicitly clear, the term "judgment", as used in Art. 3337(4), refers to a judgment resulting from a suit under Louisiana law and issued by a Louisiana Court. *See also* Ralph Slovenko, *Treatise on Creditor's Rights Under Louisiana Civil Law*, Part V, Chap. 2, § 2 at 777-778 (Claitor's 1968).

[6] Respondents' reliance on *Matter of United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) (*Brief at 7*) is difficult to fathom. That case stands for the proposition that a bankruptcy court has exclusive jurisdiction over the property of a bankruptcy estate. No one questions that the bankruptcy court had the jurisdiction to issue the order it did. The issue here is whether that order is "self-executing" in the face of the Louisiana statutes in question, or whether that order had to be domesticated and enforced, in accordance with those statutes, in order to secure the rights it afforded. *Matter of United States Brass Corp.* does not address these issues in any way.

cannot be denied about the opinion below, and the central point on which it must ultimately be vacated, is its creation of a "self-executing" judgment. *See Section "I", supra.* The Attorney General addresses this point particularly well:

> A "self-executing" judgment . . . is in reality no more than an execution, *albeit*, a "self-execution", issued by one sovereign (the United States) which that sovereign decrees must be enforced within the jurisdiction of another sovereign (Louisiana). Based upon this Court's precedents, such a decree cannot be allowed to stand.

Amicus Brief at 9.

CONCLUSION

For the reasons set forth herein, and in the Petition for a Writ of *Certiorari*, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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